From: Drew Dean
To: Microsoft ATR
Date: 1/25/02 2:07pm
Subject: Microsoft Settlement

(I'm not sure this got through the first time; it's the same text)

Renata B. Hesse
Antitrust Division
U.S. Department of Justice
601 D Street NW
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Washington, DC 20530-0001

Dear Ms. Hesse and Judge Kollar-Kotelly:

I wish to express my belief that the Revised Proposed Final Judgment (RPFJ) in US v. Microsoft is not in the public interest, and respectfully urge the Court not to approve it. While the RPFJ is a substantial improvement over the original PFJ, it remains the case that the exclusions swallow the rule. The following three examples are illustrative, but by no means the only problematic areas in the RPFJ.

(1) Section III.J.2.

The exclusions in subpart (b), "has a reasonable business need for the API, Documentation, or Communications Protocol for a planned or shipping product," (c) "meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business," and (d) "agrees to submit, at its own expense, any computer programs using such APIs, Documentation, or Communication Protocols to third-party verification, approved by Microsoft, to test for and ensure verification and compliance with Microsoft specifications for use of the API or interface, which specifications shall be related to proper operation and integrity of the systems and mechanisms identified in this paragraph." serve to exclude the people that most need this documentation, namely, the Samba team (see http://www.samba.org). The Samba team has produced an open-source implementation of the Microsoft SMB/CIFS protocols for file and printer sharing. Being an open source project, their code is freely available, and they are not a business. A reasonable interpretation of subparagraphs (b) and (c) would make them ineligible to benefit from the remedies prescribed in Sections III.D and III.E. Furthermore, the cost of the testing required by Section II.J.2.(d) is likely to be prohibitive for individuals, and non-profit open source projects, further limiting competition. While the Samba team is the most immediately relevant example, these concerns also apply to the developers of the Linux operating system and the Apache Web server.

All three of these programs are used by large numbers of people, and represent direct competition to Microsoft.

(2) The definitions in Sections VI.J, VI.K, and VI.T ("Microsoft Middleware", "Microsoft Middleware Product", and "Trademarked", respectively) appear to exclude Microsoft's Reader (see http://www.microsoft.com/reader). Microsoft Reader is the company's software for the display of electronic books. I reach the conclusion that Reader is not covered by the RPFJ as follows: (1) Sections VI.J.2, and VI.K.2.b.iii both require that the software "is Trademarked." (2) Section VI.T defines "Trademarked". Sub-paragraph (iii) says "asserting the name as a trademark in the United States in a demand letter or lawsuit. Any product distributed under descriptive or generic terms or a name comprised of the Microsoft(r) or Windows(r) trademarks together with descriptive or generic terms shall not be Trademarked as that term is used in this Final Judgment."
(3) Microsoft Reader certainly is a name comprised of "Microsoft" and a generic term, "Reader," and by the plain meaning of Section VI.T.(iii) is not Trademarked. Hence, it is neither Microsoft Middleware nor a Microsoft Middleware Product, and appears to fall entirely outside the scope of the RPFJ.

While the electronic book market is highly immature at present, many believe that it will come to dominate traditional, paper-based, publishing. The potential economies of digital storage and transmission are enormous. Publishing is a multi-billion dollar per year market and so the status of Microsoft Reader and competing products will be of great competitive significance. I believe that the public interest is best served by letting this potential market evolve in a free, competitive manner. Leaving Microsoft unconstrained is not consistent with this goal.

I also note that Microsoft can avoid having any new product designated as a Microsoft Middleware Product under the RPFJ by the simple expedient of naming it so that it falls outside the definition of Trademarked (Section VI.T).

(3) I quote Section VI.U in its entirety:

> "Windows Operating System Product" means the software code (as opposed to source code) distributed commercially by Microsoft for use with Personal Computers as Windows 2000 Professional, Windows XP Home, Windows XP Professional, and successors to the foregoing, including the Personal Computer versions of the products currently code named "Longhorn" and "Blackcomb" and their successors, including upgrades, bug fixes, service packs, etc. The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion.

This definition has two problems. First, it is internally inconsistent. It begins by defining the code comprising a "Windows Operating System Product." It then follows that definition by contradicting itself, "The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion." Which definition is meant to prevail? Neither is clearly subordinate to the other.

Second, in numerous places in the RPFJ, language of the form "not inconsistent with this Final Judgment", "consistent with this Final Judgment", or "exercising any of the options or alternatives provided for under this Final Judgment" appears. It is, however, notably missing in Section VI.U. Given the numerous other appearances of this language, its lack here appears to be significant. While one might assume that any such determinations by Microsoft would have to be consistent with the RPFJ, plain reading of this definition does not require it. As there is no indication that this definition is subordinate to the rest of the RFPJ, this could be interpreted as undermining the intent of the RFPJ, particularly in regard to middleware products. I believe the settlement would be substantially strengthened by replacing the final sentence with: "The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion, consistent with this Final Judgment."

The above examples are illustrative of the flawed approach taken in the Revised Proposed Final Judgment. I believe that the Revised Proposed Final Judgment is not in the public interest, and respectfully urge the Court not to approve it.

Sincerely,

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